(1)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

In the
Supreme Court of the United States

ANGELICA DE LA VEGA NAVARRO, *ET AL.*
INS NO. 74-811-370/371/372/373
Petitioners,

vs.

JOHN ASHCROFT, Attorney General of the
United States
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Panel Review afforded by the Ninth Circuit Court of appeals on Petitioner's Motion for Rehearing overlooked the fact that the Chief Immigration Judge "CIJ" was effectively directed not to interfere with the executive decision reserved to the then Immigration and Naturalization Service ("INS") or ("Service") as to when it would initiate proceedings, such that the CIJ's directive exceeded his statutory and regulatory authority causing harm to the Petitioners, and violating their due process rights to a fair and meaningful hearing by a judicial officer who does not assume the executive powers of the INS.

List of Parties

Petitioners:

1Angellica De La Vega Navarro, Plaintiff and Petitioner; A74-811-370

2.Salvador Navarro Vasquez, Plaintiff and Petitioner; A74-811-371

3.Salvador Raphael Navarro, Plaintiff and Petitioner; A74-811-372

4.Karla Raphael Navarro, Plaintiff and Petitioner, A74-811-373

Respondents:

5. Honorable John Ashcroft, Attorney General of the United States, Defendant and Respondent

6.John W.Richardson, Chief Immigration Judge- US Department of Justice, Executive Office of Immigration Review

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
TABLE OF CONTENTS	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTE, AND REGULATIONS AT ISSUE	6
STATEMENT OF THE CASE	9

REASONS WHY CERTIORARI SHOULD GRANTED 12

CONCLUSION 22

APPENDIX

TABLE OF AUTHORITIES

Cases

American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir. 1995), appeal after remand, 119 F.3d 1367 (9th Cir. 1997), 14
Baires v. INS. 856 F.2d 89, 91 (9th Cir. 1988). 14
Barraza-Rivera v. INS. 913 F.2d 1443, 1447 (9th Cir. 1990 14
Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). 8
Cortez-Felllipe v. INS, 245 F. 3d. 1054, 1057 (9th Cir. 2001 13
Hernandez v. Ashcroft, 345 F.3d 824, 839 n. 13 (9th Cir.2003); 8
INS v. Aguirre-Aguirre, 526 U .S. 415, 424-25 (1999); 8
Jimenez-Anqles v. Ashcroft, 291 F. 3d. 594, 597 (9th Cir. 2002 12
Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S. Ct. 472, 97 L. Ed. 576 (1953); 14
Lopez-Tellez v. INS, 564 F. 2d. 1302, 1303-04 (9th Cir. 1977) 13

Martinez-Garcia v. Ashcroft, No. 02 71043,2004 WL 868557 at 3 (9th Cir. Apr. 23, 2004). 7,12,13
Munoz v. Ashcroft, 339 F.3d 950, 191 15
Murillo-Espinoza v. INS, 261 F.3d 771, 773 (9th Cir.2001). 7
Rios-Berrios v. INS, 776 F.2d 859, 862 (9th Cir.1985) 14
United States v. Hovsepian, 359 F. 3d. 1144, 1165 (9th Cir. 2004 12
Yao v. INS, 2 F. 3d. 317, 319 (9th Cir. 1993) 13
Zazueta-Carrillo v. Ashcroft, 322 F.3d 1166, 8

Constitutional Provisions; Statutes; Regulations

8 C.F.R. Section 240.10(4)(2001) 15
8 U.S.C. 1254 7
8 U.S.C. Section 1229a(b)(4); 15
Fifth Amendment of the United States Constitution 14
Illegal Immigration Reform Act of 1996 (IIRAIRA). 7,12,14
Immigration and Nationality Act, § 240A(d)(2), as amended, 8 U.S.C.A. § 1229b(d)(2); §§ 8,11,12
INA Section 240(b)(4); 15
INA Section 240(b)(l); 8 U.S.C. Section 1229a(b)(l)(15
of IIRIRA 12

Administrative Procedures Act ("APA") notice and comment requirements.....2

5 U.S.C.Sec..551..... ...2
5 U.S.C. Sec 559.....2

OPINIONS BELOW[1]

Order denying by panel decision to the Petitioners' Motion for Rehearing, July 15, 2004

Decision of the Board of Immigration Appeals,April 29,2002 (A74 811370/1/2/3)

Notice of Appeal to the Board of Immigration Appeals, April 8, 1999 (A74 811370/1/2/3)

Order of the Immigration Judge April 2, 1999 (A74 811370/1/2/3)

[1] Text of these documents have been properly reformatted and included within the Appendix of this Writ of Certiorari.

JURISDICTION

Pursuant to **Rule 40 of the Federal Rules of Appellate Procedure ("FRAP"),** Petitioners, De La Vega-Navarro, et. al,. respectfully petitioned the Ninth Circuit for rehearing of that Court's memorandum decision denying the Petitioner's petition for review. The Panel disagreed with the Petitioners' argument that the CIJ's directive to Immigration Court personnel not to accept orders to show cause filed after March 31, 1997 constituted agency rule making within the meaning of the Administrative Procedures Act ("APA") notice and comment requirements. 5 U.S.C. Sec.551 and 559.(cited within)

As such, it rejected the Petitioners' contention that they should have otherwise been eligible for suspension of deportation relief under 8 U.S.C. 1254. In rejecting the Petitioners' argument, the Panel relied on its own concurrent decision in Martinez-Garcia v. Ashcroft, No. 02 71043,2004 WL 868557

at 3 (9th Cir. Apr. 23, 2004). In that case, the Panel reasoned that the CIJ's directive was not rule making since Congress created a bright line effective date for the Illegal Immigration Reform Act of 1996 (IIRAIRA). Martinez-Garcia v. Ashcroft, No. 02-71043,2004 WL 868557 at 3 (9th Cir. Apr. 23, 2004) Purely legal questions, as in the instant case, concerning the meaning of the immigration laws are reviewed de

novo. Murillo-Espinoza v. INS, 261 F.3d 771, 773 (9th Cir.2001). As long as the Board of Immigration Appeals ("BIA") or ("Board") intended to issue an interpretation of a statute it enforces, its interpretation of ambiguities in that statute is generally accorded deference under Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). Hernandez v. Ashcroft, 345 F.3d 824, 839 n. 13 (9th Cir.2003); see also INS v. Aguirre-Aguirre, 526 U .S. 415, 424-25 (1999); Zazueta-Carrillo v. Ashcroft, 322 F.3d 1166, 1173 (9th Cir.2003).

v. Ashcroft, 345 F.3d. 824, 839 n 13 (9th Cir 2003)," Hernandez v.Ashcroft, 345 F.3d 824, INS v. Aguirre-Aguirre, 526 U .S. 415, 424-25 (1999); Zazueta-Carrillo v. Ashcroft, 322 F.3d 1166, 1173 (9th Cir.2003).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIESS AT ISSUE

Fifth Amendment to the United States Constitution

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Illegal Immigration Reform Act of 1996 (IIRAIRA)

In order to qualify for suspension of deportation under transitional rules applicable to deportation proceedings pending at enactment of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), relevant seven-year period of continuous physical presence is period immediately preceding service of order to show cause that prompts application for suspension. Immigration and Nationality Act, § 240A(d)(2), as amended, 8 U.S.C.A. § 1229b(d)(2); §§ 309(c)(5)(A), Pub.L. No. 104-208.

7.

Administrative Procedures Act ("APA") notice and comment requirements. 5 U.S.C. Sec.551, in pertinent part:

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;
(7) "adjudication" means agency process for the formulation of an order;
(8) "license" includes the whole or a part of an agency permit, certificate

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section.

Administrative Procedures Act ("APA") notice and comment requirements. 5 U.S.C. Sec.559.

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5372, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law
judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

STATEMENT OF THE CASE

The petitioners are husband and wife. They have two children, who are 11 and 20 years of age respectively. All of the Petitioners are natives and citizens of Mexico, who-entered as visitors for pleasure in 1987 through port of entry at Los Angeles, California.

In an attempt to legalize their status, the petitioners' applied for asylum in the United States with the then existing INS. In seeking asylum, the Petitioners expressed a fear of returning to Mexico since they believed they would suffer a significant trauma over their years in the United States.

The government denied the Petitioners' application for asylum. It then instituted proceedings against the petitioners on August 29, 1998. In a hearing before an Immigration Judge, the Petitioners, through counsel, admitted the allegations and charges in the Notices to Appear that had been served upon the Petitioners.

The petitioners then withdrew their application for asylum and were only considered illegible for relief in the form of Cancellation of Removal under 8 U.S.C. 1229b. The Petitioners also sought voluntary departure from the United States.

In a subsequent hearing before an Immigration Judge ("IJ"), the Petitioners conceded that they lacked eligibility for Cancellation of Removal under 8 U.S.C. 1229b. The Petitioners, again through their attorney, submitted an internal government memorandum stating that it was the government's intention to attempt to place all individuals, who sought to apply for suspension of deportation, into deportation proceedings prior to the effective date of the IIRAIRA. (Administrative Record at pages 77, 83)

11.

The IJ, however, discounted their argument and issued an order denying their application for Cancellation of Removal for want of statutory eligibility. The Petitioners appealed to the BIA. The Board, however, issued an order summarily affirming the Immigration Judge's decision below.

9.

The Petitioners' appealed from the BIA's denial to the Ninth Circuit Court of Appeals, which, affirmed the BIA's decision and later denied rehearing by order dated July 15, 2004.

This Petition for Writ of Certiorari ensues.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. Review is warranted because of the Panel's denial of Petitioner's Motion for Rehearing, because such denial conflicts with existing statutory and regulatory authority.

The Panel overlooked the fact that the CIJ's directive had the effect of interfering with the Executive's decision as to when it would initiate proceedings. As such, the Panel failed to acknowledge that the CIJ directive was beyond his statutory and regulatory authority.

As previously stated in the statement of jurisdiction, the Panel rejected any contention that one could successfully argue that the CIJ stated a deliberate policy to delay filing of an Order to Show Cause, as IIRAIRA's effective date approached-in order to subject aliens to the more stringent requirements under the new removal procedures.

The Panel noted that Congress provided transitional rules applicable only to those aliens already in "deportation proceedings" on the effective date. (citing, IRRAIRA Sec. 309 (C), Jimenez-Anqles v. Ashcroft, 291 F. 3d. 594, 597 (9th Cir. 2002) As such, the Panel also noted that the appellate court's decisions have held on numerous occasions, both before and after IIRIRA, that an alien is not 'in proceedings' until the appropriate charging document is actually filed with the immigration court" (Citing, United States v. Hovsepian, 359 F. 3d. 1144, 1165 (9th Cir. 2004).).

The Panel concluded that "...{b]ecause the INS filed no charging document against Martinez-Garcia prior to the effective date of IIRIRA, she was not 'in proceedings' on that date, and the IIRIRA's transitional rules never applied to her.
." Id. In light of its decision in Martinez-Garcia, the Panel similarly rejected the Petitioners' contention that IIRIRA's transitional rules applied to them. As such, the Panel's decision did not have any binding effect upon the government's decision to place the Petitioners into proceedings after IIRAIRA's effective date.

The Panel also noted in Martinez-Garcia, *supra,* that Martinez-Garcia [could not] successfully argue that the [Chief Immigration Judge's] directive stated a deliberate policy to delay filing of [orders to show cause]l . . as IIRIRA' s effective date approached-in order to subject aliens to the more stringent requirements." Martinez-

Garcia v. Ashcroft, No. 02-71043, 2004 WL 868557 at 3 (9th Cir. Apr. 23, 2004)
The Panel based this conclusion on the ".. .well settled [principle] that the decision to place an alien in immigration proceedings, and when to do it, belongs to the INS. - .and is akin to prosecutorial discretion." Id. (Citing, Cortez-Felllipe v. INS, 245 F. 3d. 1054, 1057 (9th Cir. 2001)

The Petitioners, nevertheless, contend that relief in this case is warranted since the Panel, in rejecting the Petitioners' appeal, overlooked the fact that the CIJ's directive had the effect of interfering with the executive's decision as to when to initiate proceedings. Indeed, it is well settled principle that the authority of Immigration Judges is narrow in scope. Yao v. INS, 2 F. 3d. 317, 319 (9th Cir. 1993) ("As the BIA points out, the IJ was not empowered to terminate or suspend proceedings once initiated."); Lopez-Tellez v. INS, 564 F. 2d.

1302, 1303-04 (9th Cir. 1977) (holding that Immigration Judges are creatures of statute and that, under Ninth Circuit law, an Immigration Judge is without discretionary authority to terminate deportation proceedings so long as enforcement officials of the INS chose to initiate proceedings against a deportable alien and prosecute those proceedings to a conclusion)

The appellate court in Lopez-Tellez, *Id.* specifically stated that the immigration judge is not empowered to review the wisdom of the INS in instituting the proceedings..". However, the CIJ's directive had the effect of challenging the Executive's discretion as to when proceedings should commence. As such, the CIJ's directive was beyond his authority.

II. **Affirmation of the Panel's decision is a violation of the Petitioners' Due Process rights to a fair and meaningful hearing under applicable relevant statutory and regulatory authority.**

Such overstepping of authority by the CIJ caused harm to the Petitioners, such that they were denied a fair and meaningful hearing as contemplated by the Due Process Clause of the Fifth Amendment.

As a general rule, aliens who have effected an "entry" into the United States, whether lawfully or not, and are physically present therein, are within the protection of the Fifth Amendment and are accorded the full panoply of traditional due process rights. Kwong Hai Chew v. Colding, 344 U.S. 590, 73 S. Ct. 472, 97 L. Ed. 576 (1953);

American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir. 1995), appeal after remand, 119 F.3d 1367 (9th Cir. 1997), Thus, the **Fifth Amendment of the United States Constitution** protects aliens from being deprived of life, liberty, or property by the Federal Government without due process of law.

To be succinct, the **Fifth Amendment** guarantees due process in deportation proceedings. Rios-Berrios v. INS, 776 F.2d 859, 862 (9th Cir.1985) In addition, aliens in deportation proceedings are entitled by statute and regulation to certain procedural protections. Barraza-Rivera v. INS. 913 F.2d 1443, 1447 (9th Cir. 1990); Baires v. INS. 856 F.2d 89, 91 (9th Cir. 1988).

For example, an alien must be afforded a reasonable opportunity to present evidence on his behalf. INA Section 240(b)(4); 8 U.S.C. Section 1229a(b)(4); 8 C.F.R. Section 240.10(4)(2001); also see INA Section 240(b)(l); 8 U.S.C. Section 1229a(b)(l)(providing that the immigration judge must receive evidence); 8 C.F.R. Section 240.1(c)(2001).

In the same line of reasoning, since discretionary relief from deportation is a privilege created by Congress, denial of such relief cannot violate a substantive interest protected by the due process clause. Munoz v. Ashcroft, 339 F.3d 950, 191 9th Cir. 2003).

In the instant case, the CIJ has done just that. Not only have the Petitioners been denied the ability to seek relief under the more lenient suspension of deportation standard, they are to be held to the more stringent standard of
cancellation of removal.

The CIJ's denial was not only subjective, but contrary to statutory and regulatory law. The CIJ overstepped his judicial function and assumed the rule of the INS, in an executive capacity. This conduct ensured the Petitioners' would not get a fair hearing, because the circumstances under which they sought relief would be measured by a higher standard, which has historically, through more recent case law, proved to be almost impossible to achieve. There is no doubt that the Petitioners' were harmed by the CIJ's usurping the power of the INS.

CONCLUSION

Based upon the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the Panel decision of the Ninth Circuit Court of Appeals.

DATED November 2, 2004.

Respectfully submitted,

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John Pope, Esquire
Kathy M. O'Quinn
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*Counsel of Record

Appendix A

Ninth Circuit Order

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No 02-71329

Angellica De La Vega
Navarro; Salvador
Navarro-Vasquez;
Salvador Raphael
Navarro;
Karla Raphael Navarro
Petitioners,

v.

FILED JUNE 15, 2004
CATHY A. CATTERSON,
CLERK U.S. COURT OF
APPEALS

JOHN ASHCROFT, Attorney General,
Respondent.

Before: HALL AND GRABNER, Circuit Judges,
and WEINER, * Senior District Judge

The petition for panal rehearing is DENIED.

*Honorable Charles R. Weiner, Senior
United States District Judge for the Eastern
District of Pennsylvania,
sitting by designation.

APPENDIX B

BIA DENIAL

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the
Board of Immigration Appeals
April 29, 2002

File:A74-811-370 - Phoenix

In re:
DE LA VEGA NAVARRO, ANGELICA
April 29, 2002

IN REMOVAL PROCEEDINGS
APPEAL ON BEHALF OF
RESPONDENT:
Christopher J. Stender

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below, The decision below is, therefore, the final agency determination. See 8 C.F.R. § 3. 1(a)(7).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. See section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. § 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judges' order. NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. See section 240B(d) of the Act.

Steven D. Hess (sic)
FOR THE BOARD

APPENDIX C
Immigration Court Denial

ORDER

JUSTICE EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

IMMIGRATION COURT
200 EAST MITCHEL

1.

US DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW

IMMIGRATION COURT
200 EAST MITCHELL DR SUITE 200
PHOENIX, AZ 85012

Case No.: A74-811-373
In the Matter Of: NAVARRO DE LA

VEGA, KARLA ANGELICA
RESPONDENT IN REMOVAL
PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon the basis of respondent's admissions, I have determined that the respondent is subject to removal on the charge(s) in the Notice to Appear. The respondent has made application solely for voluntary departure in lieu of removal.

It is HEREBY ORDERED that the respondent be GRANTED voluntary departure in lieu of removal, without expense to the Government on or before 1 June, 99, or any extensions as may be granted by the District Director, Immigration and Naturalization Service, and under whatever conditions the District Director may direct.

It is FURTHER ORDERED:
That the respondent post a voluntary departure bond in the amount $500with the Immigration and Naturalization Service on or before 9 April 1999.

It is FURTHER ORDERED that if any of the above ordered conditions are not met as required, the above order shall be withdrawn without further notice or proceedings and the following shall thereupon become immediately effective:
respondent shall be removed to Mexico on the charge(s) in the Notice to Appear.

It is FURTHER ORDERED that if respondent fails to depart as required, the above order shall be withdrawn without further notice or proceedings and the following order shall be become immediately effective: respondent shall be removed to Mexico on the charge(s) in the Notice to Appear.

You have been granted voluntary departure from the United States pursuant to section 240B of the Immigration and Nationality Act. Remaining in the United States beyond the authorized date will result in your being found ineligible for certain forms of relief under the Immigration and Nationality act (See Section A below) for period of ten (10) years from the date of scheduled departure. Your voluntary departure bond, if any, will also be breached. Additionally, if you fail to voluntarily depart the United States within the time period specified, you shall be subject to a civil penalty of not less than $1000 and no more than $5000.

A. THE FORMS OF RELIEF FROM REMOVAL FOR WHICH YOU WILL BE INELIGIBLE ARE:

1. Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;
2.Cancellation of Removal as provided for in section 240A of the Immigration and Nationality Act;
3.Adjustment of status or change of status as provided for in section 245,248 or 249 of the Immigration and Nationality Act.

This written notice was provided to the alien in English. Oral notice of the contents of this notice was given to the alien in his/her native language or in a language he/she understands.

s/ John W. Richardson
Immigration Judge
Date: Apr 2, 1999
Appeal: RESERVED (A/I/B)
Appeal Due By: May 3, 1999.

(2)

Supreme Court, U.S.
FILED

04 890 SEP 10 2004

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

ANGELICA DE LA VEGA NAVARRO, *ET AL.*,
INS NO. 74-811-370/371/372/373,

Petitioners,

vs.

JOHN ASHCROFT,
Attorney General of the United States,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL APPENDIX

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OR CALL COLLECT (402) 342-2831

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGELICA DE LA VEGA-NAVARRO; SALVADOR NAVARRO-VASQUEZ; SALVADOR RAFAEL NAVARRO-DE LA VEGA; KARLA ANGELICA NAVARRO-DE LA VEGA Petitioners, v. JOHN ASHCROFT, Attorney General, Respondent.	No. 02-71329 INS Nos. A74-811-370, 371, 372, 373 MEMORANDUM* (Filed Apr. 21, 2004)

On Petitions for Review from Orders of the Board of Immigration Appeals

Argued and Submitted March 10, 2004
San Francisco, California

Before: HALL and GRABER, Circuit Judges, and WEINER,** Senior District Judge

Angelica De La Vega Navarro, her husband Salvador, and their two children, Karla and Salvador Rafael, all natives and citizens of Mexico, petition for review of the

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

** Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

BIA's one judge orders affirming without opinion the IJ's orders finding them removable and denying their requests for cancellation of removal.

The INS policy directive, concerning the transition to Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") procedures, had no effect upon petitioners because they were never placed "in deportation proceedings" prior to IIRIRA's effective date. *United States v. Hovsepian,* 359 F.3d 1144, 1165 (9th Cir. 2004) (en banc) (hold that proceedings do not commence until INS actually files charging document). Thus, we need not reach the issue whether the policy directive was violative of the Administrative Procedure Act. *Martinez-Garcia v. Ashcroft,* ___ F.3d ___, (9th Cir. 2004) (declining to reach APA issue where no Order to Show Cause was filed prior to IIRIRA's effective date because IIRIRA rendered OSC procedures obsolete).

The Navarros' other argument, that the BIA's streamlining regulation, 8 C.F.R. § 1003.1(a)(7), violated their right to procedural due process, is foreclosed by our recent decision in *Falcon Carriche v. Ashcroft,* 350 F.3d 845, 850 (9th Cir. 2003), holding that streamlining does not offend due process.

PETITIONS DENIED.